

**In the United States Court of Appeals  
for the Ninth Circuit**

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**NATIONAL LABOR RELATIONS BOARD, PETITIONER**

*v.*

**TRANSMARINE NAVIGATION CORPORATION AND ITS  
SUBSIDIARY, INTERNATIONAL TERMINALS, INC.,  
RESPONDENT**

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**On Petition for Enforcement of an Order of  
the National Labor Relations Board**

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**BRIEF FOR THE NATIONAL LABOR RELATIONS  
BOARD**

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**FILED**

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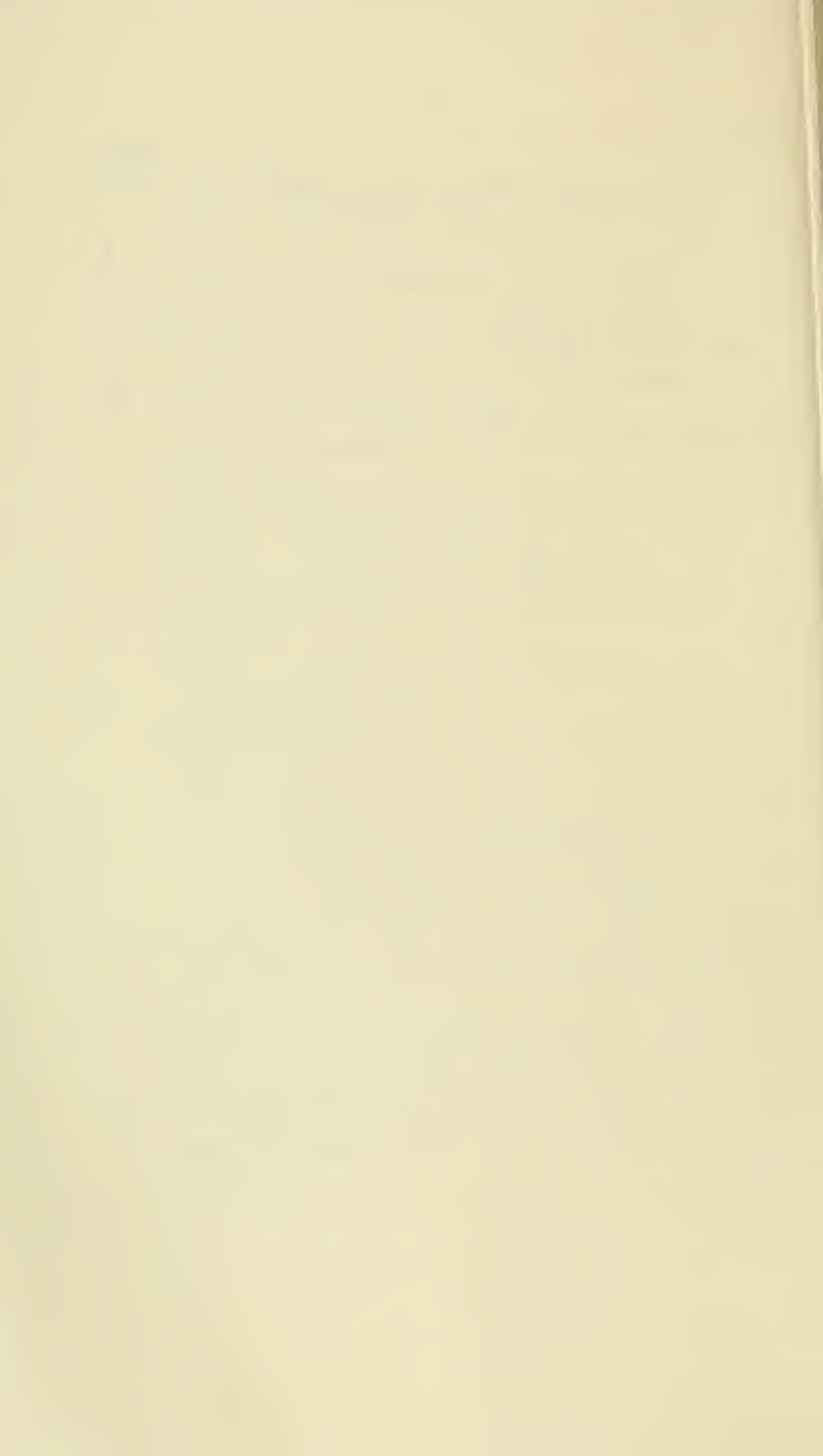
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**BRIEF FOR THE NATIONAL LABOR RELATIONS  
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**JURISDICTION**

This case is before the Court upon petition of the National Labor Relations Board to enforce its order issued against respondent (hereafter the "Company") on May 28, 1965, following proceedings under Section 10(c) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. Sec. 151, *et seq.*).<sup>1</sup> The Board's decision and

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<sup>1</sup> Pertinent provisions of the Act are set forth *infra* pp. 21-23.

order (R. 20-32, 35-37)<sup>2</sup> are reported at 152 NLRB 998. This Court has jurisdiction over the proceedings under Section 10(e) of the Act, since the unfair labor practices occurred at Los Angeles, California, within this judicial circuit.

## STATEMENT OF THE CASE

### I. The Board's Findings of Fact

The Board found that the Company breached its bargaining obligation, in violation of Section 8(a) (5) and (1) of the Act, by entering into a joint venture agreement which involved moving its operations, agreeing to contract out necessary guard service, and therefore discharging its unit of guards, all without prior notice or discussion with the union representing the guards. The evidence upon which the Board based its finding is summarized below.

The Company (Transmarine Navigation Corporation and its wholly owned subsidiary, International Terminals, Inc., concededly a single employer under the Act) was a freight agent, ship broker, steamship agent, and terminal operator at the Los Angeles harbor (R. 20; Tr. 28-29). The Company hired employ-

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<sup>2</sup> References to the pleadings and decision and order of the Board, the Trial Examiner's recommended decision and order and other papers reproduced as Volume 1, pleadings, are designated "R." References to portions of the stenographic transcript reproduced pursuant to the Rules of this Court are designated "Tr." "G.C. Ex." refers to the General Counsel's exhibits. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

ees as guards to protect cargo on the ships and in the warehouses on the dock (R. 21; Tr. 23-30). In 1960, the American Federation of Guards, Local # 1 (hereafter the "Union") was elected and certified by the Board as the collective bargaining representative of the guard unit. (R. 21; G.C. Ex. 6 (d)). Since that time a collective bargaining agreement has governed relations between the Company and the Union. The most recent agreement was concluded in 1962 and, with a termination date of June 30, 1965, was still in effect at the time of the events herein described (R. 22; Tr. 18).

In the summer of 1963,<sup>3</sup> owing to the possible loss of its main customer, a Japanese shipowner, the Company began making plans to modify its Los Angeles operations.<sup>4</sup> In August the Company began discussions with two other terminal operators about forming a joint venture to provide at the Long Beach harbor essentially the same services the Company was providing at Los Angeles. On September 5, the Company decided to close its Los Angeles operation and transfer to Long Beach, and on that date the Company consummated an agreement with the two other terminal operators. The companies entered the joint venture, known as "Sierra Terminals," with 40-40-20 percent interests, of which the Company's interest was 40 percent (R. 22; Tr. 31, 35).

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<sup>3</sup> Unless otherwise indicated, the dates hereafter refer to 1963.

<sup>4</sup> The Japanese government had ordered a consolidation of Japanese shipping companies, which would require facilities larger than the Company's. (Tr. 193-194)

By September 5, the date the joint venture agreement was executed, the Company had determined that it would discharge its guards on October 31, since the joint venture had determined to contract for the use of guards employed by Newton Security Patrol, a company which had provided guards for the Long Beach terminal operator which the joint venture was replacing. Newton's guards were represented by another union, and their wage scale was almost a dollar an hour less than that received by the guards represented by the Union. The Company, however, had not revealed the joint venture agreement to the Union, and it did not notify the Union of its plan to discharge the guards (R. 21, 24-25; Tr. 38-39, 164-171, 214).

On September 15, the Company's vice-president, Lloyd Linn, told one of the guards, Ernest McClintock, that the Company was thinking of closing its Los Angeles terminal in order to join with two other companies. Linn requested that McClintock keep this information confidential. However, shortly thereafter McClintock told the Union's secretary-treasurer and business agent, Curtis Walker, that there were "rumors" that the terminal might close (R. 24; Tr. 135). About a week later, Vice-president Linn told McClintock, who held no official position in the Union, to advise the guards that they would be terminated about November 1, as the joint venture planned to use Newton Security Patrol for guard service at Long Beach (R. 24; Tr. 132, 136). Linn suggested that the guards talk to Newton about employment at Long Beach. McClintock did so, and Newton offered to

employ McClintock regularly and put the other Company guards on a stand-by basis, to work when needed. Since Newton's hourly wage scale was almost a dollar less than the Company's, the guards rejected Newton's offer (R. 24; Tr. 145).

On October 24, in a Company bulletin distributed to other employees but not to the guards, the Company president, Max J. Linder, advised the employees that they would be terminated as employees of the Company and reemployed by the joint venture at Long Beach on November 1 (R. 22; Tr. 19, G.C. Ex. 4.)

During the last week in October, McClintock had occasion to speak with Union Representative Walker. McClintock told him that what had once been rumor was now an accomplished fact; the Company had determined to end its Los Angeles operations (R. 24; Tr. 148-149). Shortly thereafter Walker received a letter from Vice-President Linn, dated October 28. The letter arrived only 2 days before all Los Angeles operations ceased, and stated as follows (R. 22; Tr. 39, 41, G.C. Ex. 5):

We regret to inform you that on October 31, 1963, International Terminals, Inc., will cease business. Accordingly, on that date our agreement of June 30, 1962 will no longer be operative.

We are sorry that this event will terminate the employment of the guards who are members of your organization. We are doing all possible to secure other employment for them. We take this opportunity to express our appreciation to you

for your consideration and cooperation in this matter.

Walker tried to reach Linn by phone as soon as he had received the letter. (Tr. 42). He was not able to reach Linn, however, until October 30, 1963 (Tr. 42). Walker asked Linn why the Company was terminating the guards. Linn said the Company was "going out of business" and "moving to Long Beach." When Walker asked Linn whether he would rehire the guards at Long Beach, Linn replied only that "he had made arrangements to hire another guard service" (Tr. 39-42). On November 1 the Company discontinued its Los Angeles harbor operations and terminated the guards (R. 24; Tr. 214).

In late November Walker telephoned Linn and asked that the Company continue to honor the unexpired contract. Linn said he would ask his attorney to confer with the Union's attorney. However, no such discussion took place between the parties (R. 36 n. 1; Tr. 42-43).

The Union filed unfair labor practice charges alleging, *inter alia*, that the Company had violated its bargaining obligation and on June 12, 1964, the Board issued a complaint on that ground (R. 6-12). On June 24, 1964, the Union's attorney wrote the Company suggesting a settlement. The Company, on June 25, replied that it was willing to bargain about "any matters in dispute" (R. 29; Tr. 107-108).

## II. The Board's Conclusions and Order

The Board found that the Company violated Section 8(a)(5) and (1) of the Act by failing to notify

the Union before agreeing to close down its Los Angeles facility and to participate in a joint venture at Long Beach using contract guard service, and by thereafter discharging the guards before giving the Union an opportunity to negotiate concerning the effect of the joint venture agreement on the guards' employment (R. 26, 35).

The Board's order requires the Company, in addition to posting the usual notice, to make the guards whole for any loss of earnings which they suffered from the time of their discharges to the Company's acceptance on June 25, 1964, of the Union's request to bargain about the guards' employment. The Board concluded that, although a bargaining violation had been committed, in the circumstances it would not be appropriate to issue an order requiring the Company to bargain with the Union (R. 28-32, 36-37).

## ARGUMENT

### **I. Substantial Evidence on the Whole Record Supports the Board's Finding That the Company Failed to Notify and to Confer With the Union Before Entering Into a Joint Venture to Relocate Its Operations and to Displace Its Unit of Guards With Contract Guard Service, in Violation of Section 8(a)(5) and (1) of the Act**

As shown in the Statement, the Union was elected and certified as the representative of a unit of guards employed directly by the Company at its Los Angeles harbor terminal. In the summer of 1963, when the parties' current contract still had 2 years to run, the inadequacy of current facilities threatened the loss of the Company's main customer. The Company decided

to move from Los Angeles and, without notifying the Union, entered into a joint venture agreement with two other companies in order to provide a larger terminal for its customers at Long Beach harbor. Then, although transferring its other employees, the Company discharged its guards since the joint venture had obtained contract guard service, at a much lower wage rate, for the Long Beach facility. The Company notified the Union of these actions 1 or 2 days before the closedown of its Los Angeles operation. Thus, the exclusive representative chosen by the guards to represent them was notified only after the abolition of their jobs through use of a contract guard company had become a *fait accompli*.

The statute guarantees the employees' spokesman an opportunity to explore alternatives to a managerial decision to modify or to curtail operations when the decision would substantially affect unit work. Given the inevitability of the decision, the bargaining representative is entitled to negotiate concerning the effects thereof, e.g., whether or under what conditions the employees' jobs will be preserved and, if not, the extent of such termination rights as pensions and severance pay. *N.L.R.B. v. Brown-Dunkin Co.*, 287 F. 2d 17, 20 (C.A. 10); *Town & Country Mfg. Co. Inc. v. N.L.R.B.*, 316 F. 2d 846 (C.A. 5). Accord: *N.L.R.B. v. Lewis*, 246 F. 2d 886, 888-889 (C.A. 9); *N.L.R.B. v. Mackneish*, 272 F. 2d 184 (C.A. 6), enforcing 119 NLRB 162, 168, 189-190; *N.L.R.B. v. Intracoastal Terminal, Inc.*, 286 F. 2d 954 (C.A. 5). Accordingly, the Trial Examiner correctly found that the Company had a statutory obli-

gation to confer with the Union before entering into a contractual commitment to move its Los Angeles operations and to abolish all guard employment, and to conduct its operations at Long Beach as part of a joint venture which would contract out the necessary guard service. The Company did not challenge this finding (R. 33-34), and it was properly affirmed by the Board. Moreover, that the proposed modification in operations and contracting out of unit jobs were a mandatory subject of bargaining is illustrated by the decision in *Fibreboard Paper Products Corp. v. N.L.R.B.*, 379 U.S. 203, 204-215, which was decided shortly after the Trial Examiner issued his decision. In *Fibreboard*, the Supreme Court held that an employer which operated a manufacturing plant was under a duty to bargain with the statutory representative of its maintenance employees about its decision, based on lawful economic considerations, to discharge such employees and to engage an independent contractor to perform the plant maintenance work. Under the principles settled by *Fibreboard* an employer has, for example, the dual obligation to discuss a proposed decision to discontinue the cheese cutting and prepacking phase of his operations and to give the union reasonable notice and opportunity to negotiate concerning the effects on unit employment of such a decision. *N.L.R.B. v. Winn-Dixie Stores, Inc.*, 361 F. 2d 512, 516-517 (C.A. 5). enforcing 147 NLRB 788. See also, *N.L.R.B. v. American Manufacturing Company of Texas*, 351 F. 2d 74, 80 (C.A. 5); *N.L.R.B. v. Northwestern Publishing Company*, 343 F. 2d 521, 526 (C.A. 7). No meaningful

distinction can be drawn between *Fibreboard* and the cited cases and a case, like the instant one, where the employer unilaterally decides to modify his operations by participating in a joint venture at a different location in the same area, with the same customers and work force except for one department of employees which he unilaterally arranges to displace with the services of an independent contractor.<sup>5</sup> Cf. *N.L.R.B. v. Royal Oak Tool & Machine Company, et al.*, 320 F. 2d 77, 82-83 (C.A. 6).

Before the Board the Company (R. 33) defended its actions solely on the ground that it had conferred in good faith with the Union in conformity with the bargaining obligation described above.<sup>6</sup> The record

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<sup>5</sup> In clear contrast, for example, are managerial decisions which involve abandonment of an uneconomical operation in a particular market, or a major and basic redirection of an operation through reinvestment or withdrawal of capital, and which, in the view of the Third and Eighth Circuits, raise, under *Fibreboard*, only an obligation to bargain concerning the effects of the decision. See, *N.L.R.B. v. The William J. Burns, International Detective Agency*, 346 F. 2d 897, 902 n. 2 (C.A. 8) (decision to cease totally operations within the state); *N.L.R.B. v. Royal Plating and Polishing Co.*, 350 F. 2d 191, 196 (C.A. 3) (decision, when land is to be taken by public authority, to abandon plant and not resume operation elsewhere). And see, the Board's decision on remand from the Third Circuit, 160 NLRB No. 72, decided September 8, 1966 (63 LRRM 1045). See also, *N.L.R.B. v. Adams Dairy, Inc.*, 350 F. 2d 108, 109 (C.A. 8), cert. denied, 382 U.S. 1011.

<sup>6</sup> However, after entry of the Board's decision the Company filed a motion for reconsideration, stating that since it "went out of business at the time [the] guards were discharged" (R. 38), an unfair labor practice finding and remedial order were barred under the holding in *N.L.R.B. v. Darlington Mfg. Co.*, 380 U.S. 263. *Darlington* issued 2 months before the Board's

wholly refutes this assertion. Vice-President Linn commonly dealt with Union Representative Walker, but in several meetings during August 1963 Linn did not disclose that the Company was then considering moving its operations to the joint venture (Tr. 38, 215-216), and was considering whether to retain the guards with other employees or to utilize the guards then being provided at Long Beach by Newton Security Patrol (Tr. 33, 66, 76). Nor was the Union sufficiently notified or granted an opportunity for

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decision and the Board, noting that the Company raised matters previously considered, denied the motion (R. 41). We submit this ruling was correct. *Darlington* involved Section 8 (a) (3) of the Act, which bans discrimination to discourage union membership. The decision holds that an employer is not subject to this statutory proscription when—wholly unlike the action taken by the Company—he goes completely and permanently out of business and ceases to be an employer subject to the Act's regulation. *Darlington* reaffirms settled doctrine that a managerial decision affecting terms and conditions of employment which is less than a total withdrawal from the entire marketplace, and which is motivated by antiunion considerations, is condemned by Section 8(a) (3) (380 U.S. at 271-274). It may scarcely be contended that these holdings were intended, contrary to the bargaining obligation earlier imposed by the Supreme Court in *Fibreboard*, to permit an employer to make the lesser management decisions without meeting Section 8(a) (5) requirements to confer with the employees' representative. See, *N.L.R.B. v. American Manufacturing Company of Texas*, *supra*, 351 F. 2d at 79 n. 10, 80.

*Darlington* leaves open the issue of whether a complete going out of business not only may absolve an employer of liability for antiunion discrimination, but also may absolve him of statutory bargaining duties. The Supreme Court noted that it had no occasion to pass on this issue. (380 U.S. at 267 n. 5, 272 n. 14). Obviously the issue is not presented here. *Darlington* has no relevance to this case.

discussion by virtue of Linn's statements to one of the guards (McClintock) in mid-September, as the Company asserted before the Board. McClintock was not authorized to speak for the Union.<sup>7</sup> Furthermore, Linn's discussions with McClintock all took place after the September 5 joint venture agreement and the decision to displace the guards had already taken place. McClintock was only told initially, and somewhat inaccurately, that the Company was "thinking" about the move. Moreover, he was asked to keep the information confidential, and, in a subsequent discussion with Union Representative Walker, McClintock spoke only of a "rumor" that the Los Angeles terminal was to be closed.

In late September Linn told McClintock of the impending move and that the guards would be discharged on November 1, when the Company would discontinue the terminal. Linn, however, still ignored the Company's obligation to treat with the employees' representative. Thus Linn himself arranged the unfruitful discussions, between McClintock and Newton, concerning the guards' possible employment by Newton after November 1. Any notion that the Company intended Union participation in such discussions, through full disclosure to the guards them-

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<sup>7</sup> During the hearing, the Company asserted that McClintock was a Company supervisor; however, the Trial Examiner concluded he was a rank-and-file employee. As the Examiner noted, the Company apparently abandoned the supervisory contention in recognition that it was inconsistent with the claim that discussions with McClintock satisfied the obligation to confer with the Union (R. 23 n. 3). The Company does not contest the Trial Examiner's employee finding (R. 33-34).

selves, is also negated by the exclusion of the guards from distribution of the Company bulletin of October 24, which explained the relocation: the guards normally received such bulletins (Tr. 69-71). The Company's conduct, in short, gives no support for a conclusion that by discussions with the unit employees the Company fulfilled the affirmative duty to take no such action affecting employment without prior consultation with the employees' representative, *N.L.R.B. v. Tom Joyce Floors, Inc.*, 353 F. 2d 768, 772 (C.A. 9). As stated by the Tenth Circuit in similar circumstances (*N.L.R.B. v. Brown-Dunkin Co.*, *supra*, 287 F. 2d at 20):

While the Union appears to have had some intimation of the impending [contract to subcontract maintenance work], it was not until the morning of the effective date of the contract that the Union learned it had been consummated and this information was obtained through the employees, not the employer. Under no stretch of the imagination can it be said that these circumstances gave the Union a fair opportunity to bargain with [the Company] about not subcontracting the work, or . . . the conditions of new employment.

Accord: *Industrial Union of Marine and Shipbuilding Workers of America, AFL-CIO v. N.L.R.B. (Bethlehem Steel Co.)*, 320 F.2d 615, 620 (C.A. 3), cert. denied, 375 U.S. 984.

The above principles equally dispose of the Company's contention that notification to the Union 2 days before closing of the Los Angeles terminal pre-

sented the Union with the opportunity to request negotiations. The Company's letter was one of farewell, not of invitation. Little was left to negotiate. (see, *supra* pp. 5-6). This is demonstrated by Linn's response to the Union's immediate inquiry and attempt to salvage at least some employment with the Company at Long Beach. Asked to consider using the guards there, Linn stated that he had made "other arrangements." The Company's assertion that a bargaining opportunity arose in late November has even less foundation. Apart from the impossibility of meaningful discussions at that juncture, the Company still gave no indication that it would meet with the Union and explore the guards' employment. Thus, the Company having stated in its letter that the parties' unexpired contract was "no longer . . . operative," the Union telephoned to request that the agreement be honored. Linn said he would confer with the Union's attorney, but he apparently did not do so. An unfilled commitment to the employees' representative is not collective bargaining.<sup>8</sup>

Finally, the Company's unilateral actions may not be defended on the ground that the decision to enter

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<sup>8</sup> The Company, moreover, put misplaced reliance on an alleged lack of solicitude by the Union once it heard rumors of the impending move to Long Beach. As the Sixth Circuit held of a similar contention, "Although the union's conduct in neglecting to negotiate during an eight month period, was certainly not exemplary, it seems to us that it constituted more of a violation of a duty owing to its members than to [the employer]." *McLean v. N.L.R.B.*, 333 F. 2d 84, 888 (C.A. 6). Cf. *N.L.R.B. v. The Item Co.* 220 F. 2d 956, 958-959 (C.A. 5).

the joint venture at Long Beach was required in order that the Company might remain in business, and that the decision had to be made quickly and kept confidential. The Act sometimes contemplates less than "full-scale collective bargaining" on a mandatory subject, and "statutory bargaining requirements should be flexibly administered to meet the needs of the particular case." *District 50, UMW v. N.L.R.B.*, 358 F. 2d 234, 238 (C.A. 4) (affirming Board's view that the need for prior notice and the adequacy of the discussion regarding a decision to subcontract are dependent, *inter alia*, upon the impact on the employees). The Company was only required to make a reasonable accomodation of the alleged business necessities with the duty to give the Union notice and opportunity for discussion. The Company, however, was not authorized to bypass the Union entirely. Furthermore, none of the alleged factors explain the Company's failure to confer with the Union before arranging for displacement of the guards and actually discharging them, and thereby depriving the Union of any negotiations concerning the effects of the joint venture on the guards' employment. Though a minority member of the joint venture, the Company was surely situated to urge any Union suggestion; it was able to retain its remaining work force. Indeed, before the Board the Company stressed its right to withdraw from the consummated joint venture agreement if a more advantageous alternative became feasible. The possibility thus existed that the guards' employment opportunities could have been wholly or partially preserved. Plainly, the "chances [were] good enough to

warrant subjecting [this issue] to the process of collective negotiations." *Fibreboard Paper Products Corp. v. N.L.R.B.*, *supra*, 379 U.S. at 214.

The Board properly rejected the Company's attack on the Trial Examiner's recommended backpay order (R. 35-36). It is now settled that an economic decision taken unilaterally in violation of the bargaining requirements of Section 8(a)(5) and (1) of the Act may be remedied by an order restoring the *status quo ante*. For example, a unilateral decision to modify operations which abolishes unit jobs may appropriately be remedied by requiring the employer to resume the operation with his own employees; to reimburse them for any lost earnings from the date of job deprivation to their reinstatement; and to bargain about the decision. *Fibreboard Paper Products Corp. v. N.L.R.B.*, *supra*, 379 U.S. at 215-217. *Town & Country Mfg. Co. v. N.L.R.B.*, 316 F. 2d 846 (C.A. 5) In the instant case (see *supra* pp. 6-7), the substantive portions of the Board's order are much narrower. In all the circumstances the Board determined that restoration, reinstatement, and bargaining were not appropriate. The Board, however, directed the Company to make its guards whole for any loss of earnings they incurred from the time of their discharges (November 1, 1963) until the Company agreed to bargain with the Union concerning the guards' employment (June 25, 1964). This limited relief is well within the Board's broad authority to frame appropriate remedial orders. *Fibreboard Paper Products Corp. v. N.L.R.B.*, *supra* 379 U.S. at 215-216.

The Company asserted that no backpay was warranted in view of its notification letter to the Union on October 28, Vice-president Linn's discussion with Union Representative Walker on October 30, and the telephone conversation between Linn and Walker in late November. These Company actions assertedly satisfied the obligation to bargain *prior* to the guards' discharges. However, as shown *supra*, pp. 10-15, the Company did not negotiate. The Company handed the Union a *fait accompli* and declared that the parties' contract and bargaining relationship were terminated. As the Board noted, this is not "collective bargaining within the Act's meaning" (R. 36). Imposing liability for possible loss of earnings up to the date the Company agreed to perform that statutory duty, is a rational requirement. *N.L.R.B. v. Winn Dixie Stores*, *supra*, 361 F. 2d at 515 n. 6; *N.L.R.B. v. American Mfg. Co. of Texas*, *supra*, 351 F. at 80-81. Cf. *N.L.R.B. v. Exchange Parts*, 339 F. 2d 829, 831-832 (C.A. 5). The Company chose to transgress employee rights, and is ill situated to insist on virtually total exculpation. The redress ordered is appropriate; it achieves "a balanced and economically feasible accomodation between the interests of the parties." *District 50, UMW v. N.L.R.B.*, *supra*, 358 F. at 238.

## CONCLUSION

For the foregoing reasons, we respectfully request that the Board's order be enforced in full.<sup>9</sup>

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<sup>9</sup> Additional contentions, though not raised in the Company's brief to the Board, were contained in the Company's exceptions to the Trial Examiner's decision (R. 34). They have no merit. (1) The alleged contract right of the Union to invoke the grievance procedure in the parties' agreement (see R. 26-27) does not prevent the Board from remedying the Company's unfair labor practices which infringed on statutory rights. *N.L.R.B. v. Walt Disney Productions*, 146 F. 2d 44, 47-49 (C.A. 9), cert. denied, 324 U.S. 877; *N.L.R.B. v. Thor Power Tool Co.*, 351 F. 2d 584, 587 (C.A. 7). (2) The Board's Rules requiring the General Counsel to produce for cross examination the investigatory pre-hearing statements taken from his witnesses, clearly did not require the General Counsel to produce a prehearing statement of the Company's own witness (McClintock). See, *N.L.R.B. v. Vapor Blast Mfg. Co.*, 287 F. 2d 402, 407 (C.A. 7), cert. denied, 368 U.S. 823. Moreover, the Company did not, and could not, show prejudice. Thus, the Company apparently sought to show that McClintock's statement indicated his supervisory authority (Tr. 109, 156-163). As shown *supra* p. 12 n. 7, the Company filed no exceptions to the Examiner's nonsupervisory finding, and is barred from further raising it. *N.L.R.B. v. International Union of Operating Engineers, Local 66, etc.*, 357 F. 2d 841, 846 n. 10 (C.A. 3). (3) The Board properly included guards Campbell and Gill in the backpay order. As the Board noted (R. 24, 28-29) the record did not reveal whether the two men were regularly employed, or employed at all, at the time of the Company's unlawful unilateral action. Accordingly, as usual in such circumstances, this issue and the amount of lost earnings, if any, will be determined at the compliance stage of the proceedings, after entry of the Court's decree. If not amicably resolved, the issue will go to supplemental Board proceedings. *N.L.R.B. v. Local 776, IATSE (Film Editors)*, 303 F. 2d 513, 521 (C.A. 9), cert. denied, 371 U.S. 826; *N.L.R.B. v. J.H. Rutter-Rex Mfg., Inc.*, 245

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September 1966.

# CERTIFICATE

The undersigned certifies that he has examined the provisions of Rules 18 and 19 of this Court, and in his opinion the tendered brief conforms to all requirements.

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F. 2d 594, 597-598 (C.A. 5). See, *N.L.R.B. v. Deena Artware, Inc.*, 361 U.S. 398, 411; *N.L.R.B. v. Ellis & Watts*, 344 F. 2d 67 (C.A. 6).

## APPENDIX A

Pursuant to Rule 18.2(f) of the Rules of the Court

## GENERAL COUNSEL'S EXHIBITS

<u>No.</u>	<u>Identified</u>	<u>Received in Evidence</u>
1(a) through 1(n)	5	5
2	17	18
3	18	18
4	18	19
5	19	20
6(a) through 6(d)	21	22
7	39	41

## APPENDIX B

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Secs. 151, *et seq.*) are as follows:

## RIGHTS OF EMPLOYEES

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

## UNFAIR LABOR PRACTICES

Sec. 8 (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

\* \* \* \*

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a).

\* \* \* \*

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the em-

ployees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: \* \* \*

\* \* \* \*

### PREVENTION OF UNFAIR LABOR PRACTICES

Sec. 10 (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: \* \* \*

\* \* \* \*

(e) The Board shall have power to petition any court of appeals of the United States, . . . within any circuit . . . wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole

or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record . . . . Upon the filing of the record with it, the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the . . . Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

